

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

|                    |   |              |
|--------------------|---|--------------|
| STEPHEN KARL GRESH | : | CIVIL ACTION |
|                    | : |              |
| v.                 | : |              |
|                    | : |              |
| BERKS CO., et. al. | : | No. 00-5697  |

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 18, 2002

Stephen Karl Gresh ("Gresh"), originally bringing this action as a prisoner pro se, claims that defendants offered him constitutionally deficient medical care. After Gresh's release from prison, a motion to dismiss was granted in part and denied in part. The following claims survived:

a. Plaintiff's § 1983 claim against Officer Holliday, in her individual capacity, for denial of medical care when plaintiff was vomiting blood;

b. Plaintiff's § 1983 claim against Carl Hoffman, A. Rab Chowdhury, and Marybeth Jackson, in their individual capacities, for denial of appropriate medical care for plaintiff's Hepatitis C;

c. Plaintiff's § 1983 claim against John Haynes and Sandy Martin, in their individual capacities, for their denials of access to medication;

d. Plaintiff's claims against Berks County and the Berks County Prison:

i. Under § 504 of the Rehabilitation Act for denial of access to the dental care program;

ii. Under § 1983 for the policy of denying a seriously ill prisoner access to necessary but costly medical care;

iii. Under § 1983 for the policy and procedures resulting in prisoners routinely not receiving prescribed medications.

Gresh retained counsel while discovery was ongoing. All defendants then moved for summary judgment. After oral argument, the motions for summary judgment will be granted for the following reasons.

#### I. Factual History

From February 17, 2000, through May 21, 2001, Gresh was an inmate at the Berks County Prison (the "Prison"), in Berks County, Pennsylvania. Gresh suffered from several pre-existing medical conditions: Hepatitis C;<sup>1</sup> attention deficit disorder; gastrointestinal problems; tooth decay; and clinically diagnosed depression (marked by an attempted suicide).

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<sup>1</sup>"Hepatitis C is a condition which results in the inflammation of the liver. See STEDMAN'S MEDICAL DICTIONARY 808 (27th Ed.2000). The ensuing liver cell damage causes, inter alia, the retention of bilirubin (a type of bile pigment) as well as a rise in the level of particular enzymes. See id. at 202, 808. Of the various forms of hepatitis, Hepatitis C has the highest likelihood of becoming a chronic condition and at least 20% of Hepatitis C patients eventually develop cirrhosis. See THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 382-383 (17th ed. 1999)." McKenna v. Wright, 2002 WL 338375, \*1 n. 1 (S.D.N.Y. Mar. 4, 2002).

A. Facts Relevant to a Claims of Denial of Access to Care for Hepatitis C

One week after entering the Prison, Gresh met with John D. Surry, M.D. ("Dr. Surry"), the medical director of Prime Care Medical, Inc. ("Prime Care"). Prime Care is an independent contractor that provided medical coverage at the Prison. Prime Care refers inmates with exceptional medical needs to outside specialists. The decision to refer an inmate to an outside specialist is made by Prime Care's prison medical director.

Dr. Surry requested Gresh's medical records, and reviewed his liver enzymes to determine the severity of his Hepatitis C infection. Dr. Surry made an initial determination that Gresh's disease was stable.

Within days, Gresh filed a pro se petition in the Court of Common Pleas of Berks County for Modification of Sentence under 61 P.S. § 81. Gresh alleged that he needed to be released from prison to be treated for his disease. At a court hearing in April, 2000, Dr. Surry testified that Gresh was a candidate for a treatment consisting of a mix of Ribavirin and Interferon, both anti-viral agents (the "combination therapy"), but not every candidate is suitable for the combination therapy. Because Interferon causes depression, individuals must be cleared by a psychiatrist before they can receive the combination therapy. Because it can also have serious side effects, the individual's Hepatitis C must be sufficiently progressed and the individual's

condition deteriorating before treatment is warranted. Dr. Surry testified further that if Gresh successfully completed the testing process, he would receive the combination therapy.

At a second hearing in June, 2000, Judge Sprecher of the Court of Common Pleas spoke with defendant Dr. Carl Hoffman ("Dr. Hoffman"), the President of Prime Care. Dr. Hoffman assured the court the Prison would test Gresh's blood and forward the results to an appropriate outside specialist.

In July, 2000, defendant Marybeth Jackson, M.D. ("Dr. Jackson") became Prime Care's medical director at the Prison. Dr. Jackson referred Gresh to a liver specialist, defendant A. Rab Chowdhury, M.D. ("Dr. Chowdhury"). Gresh met with Dr. Chowdhury on July 6, 2000. Dr. Chowdhury noted that Gresh had a history of depression. He recommended Gresh continue receiving Axid for his gastrointestinal problems despite Gresh's concern about possible liver damage. Dr. Chowdhury ordered further testing to determine Gresh's eligibility for the combination therapy.

Gresh then sent Dr. Chowdhury a letter, attaching recent medical literature regarding Hepatitis C treatments. The letter stated, in relevant part:

Please also feel free to utilize this information as a guide, or for cross-referencing purposes, for any future report(s) or testimony concerning my unfortunate condition. Thank you in advance, and I look forward to finally receiving treatment as soon as possible.

You are further requested to make a duplicate copy of the CHOWDHURY report and entire medical record file, and mail such to [my attorney].

Please also remain available on July 20, 2000, between 11:00 a.m. and 12:00 p.m. ... in the event that your expert testimony may become necessary before the honorable court.

/s/ [Gresh], Certified Legal Assistant  
((Thank you kindly!))

Upon receipt of this communication, Dr. Chowdhury withdrew as Gresh's liver specialist. Shortly thereafter, at a third hearing before the Court of Common Pleas in late July, Gresh testified that Dr. Chowdhury refused to treat him because the time remaining on his term of incarceration was less than the time required to completed the drug therapy. Gresh did not bring the Dr. Chowdhury correspondence, suggesting no such final decision had been made, to the attention of the Court.

Judge Sprecher asked Dr. Hoffman to find a new specialist; Dr. Hoffman and Dr. Jackson referred Gresh to Dr. Thomas R. Riley ("Dr. Riley"). Dr. Jackson continued to monitor Gresh's liver function while Gresh awaited an appointment with Dr. Riley.

On September 8, 2000, Gresh filed a Petition to Permit Absence from Jail for Medical Treatment; the Petition would have allowed Gresh to visit his own specialist. Judge Sprecher denied this Petition.

In December, 2000, Dr. Riley examined Gresh. He ordered a liver biopsy to determine if the combination drug treatment was appropriate.

On January 4, 2001, Judge Sprecher held that "PrimeCare Medical has acted appropriately in securing care for Mr. Gresh's Hepatitis C." Gresh's appeal of this decision was dismissed.

On March 16, 2001, Gresh's liver biopsy showed a minimal inflammation corresponding to mildly active Hepatitis C.

Gresh was released from the Prison on May 8, 2001.

On August 10, 2001, Dr. Riley met with Gresh to discuss his treatment.<sup>2</sup> Dr. Riley told Gresh that the best course of treatment was a "watch and wait" strategy because Gresh's most recent blood tests showed that his disease was under control. Dr. Riley discussed with Gresh the National Institute of Health consensus that low grade Hepatitis C did not warrant aggressive drug treatment. Gresh told Dr. Riley he would seek a second opinion. It is unclear if Gresh has begun the combination therapy to date.

B. Facts Relevant to Claim of Denied Dental Care Under Rehabilitation Act

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<sup>2</sup>Plaintiff's brief mentions an earlier meeting and letter, but Plaintiff does not submit the letter or detail the meeting.

Plaintiff admits he saw a dentist on March 10, 2001. Michael Kovaleski ("Dr. Kovaleski"), D.M.D., confirmed Gresh had a cavity and offered to fill it with a metal filling (a white filling was out of stock). Gresh, allegedly refusing a silver filling, stated he would wait for the white filling. Plaintiff's cavity was not filled before his May 21, 2001, release from Prison. Dr. Kovaleski avers that he did not deny Gresh treatment because of his Hepatitis C condition, and that he has treated other similarly affected inmates.

C. Facts Relevant to Plaintiff's Claims Against Officer Holliday

Plaintiff alleges that defendant Officer Catherine Holliday ("Holliday") was deliberately indifferent to his medical needs on June 22, 2000; she ignored his requests for medical help and refused to get assistance when he vomited blood.

In his deposition, plaintiff did not recall if he vomited blood, and admitted it might have been fruit punch. Holliday alerted the first passing nurse, and the nurse advised her that she would take care of the problem. Plaintiff admits that he does not know if Holliday saw him vomit; Holliday avers she did not.

D. Facts Relevant to Plaintiff's Claim of Denial of Access to Medication

Plaintiff's original complaint outlined occasions where he was denied access to medication by Sandy Martin ("Martin"), John Haynes ("Haynes") and the Berks County defendants. In his deposition, plaintiff admitted that medication may have been delivered late, not denied, on an unspecified number of days. Plaintiff does not provide any documentation supporting his claim that his heartburn medication was not provided him on a regular basis.

## II. Discussion

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the opposing party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). There is an issue of material fact only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party is entitled to every favorable inference that can be drawn

from the record. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Relevant facts will be considered according to this standard in the discussion of the motions.

In most cases, if the moving party meets his burden, the opposing party must introduce specific, affirmative evidence manifesting a genuine issue of material fact requiring a trial. See Celotex, 477 U.S. at 322-324. A plaintiff must "point to concrete evidence in the record that supports each and every essential element of his case" to survive summary judgment. Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995); Fed R. Civ. Pro. 56(e). But, if the movant's papers themselves create a triable issue of fact, or if the movant's evidence "raises subjective questions such as motive, intent, or conscience, there may have to be a trial inasmuch as cross-examination is the best means of testing the credibility of this kind of evidence." Charles Alan Wright et al, 10A Federal Practice and Procedure § 2727 (1998).

Three groups of defendants move for summary judgment: (1) Dr. Chowdhury and Dr. Jackson; (2) County of Berks, Berks County Prison Board, and Officer Holiday; and (3) Dr. Hoffman, Martin, and Haynes. The defendants have produced voluminous evidentiary support for their motions, including affidavits, expert reports, depositions, contemporaneous correspondence, and notes.

Plaintiff responds with a cursory brief. He disputes one legal issue raised by some of the defendants (claim preclusion), and argues, without explanation, that defendants' evidence fails to meet their burden because the issues raised necessarily implicate credibility determinations best left to the jury. Plaintiff submits no evidence of his own, nor identifies any evidence submitted by defendants, to support his claims. Plaintiff also argues, for the first time, that defendants are liable to him as a third party beneficiary of a contract.<sup>3</sup>

The court's order on defendants' motion to dismiss sets forth the law governing this action. The claims that survived the motion under Fed. R. Civ. Pro. 12(b)(6) are now analyzed under Fed. R. Civ. Pro. 56.

A. Claims for Deprivation of Medical Care under § 1983

"To impose liability under Section 1983, a plaintiff must establish with particularity that the named defendant was directly and personally involved in the deprivation of the

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<sup>3</sup>Plaintiff's counsel is Kathleen D. Dautrich, Esq. Ms. Dautrich consistently failed to file documents within the time constraints imposed by the court's scheduling orders. She failed to return repeated phone calls from the court's deputy clerk. Her brief displays little awareness of the Federal Rules of Civil Procedure or constitutional law. At oral argument, she asserted a lack of time to understand the case, but Ms. Dautrich also represented Gresh during the state court proceedings; this excuse lacks credibility.

plaintiff's rights." Payton v. Vaughn, 798 F. Supp. 258, 260 (E.D. Pa. 1992)(citations omitted).

In order to bring a claim for unconstitutional deprivation of medical care, plaintiff must allege: (1) a sufficiently serious medical need; and (2) the defendant was deliberately indifferent to that serious medical need. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). The Supreme Court has strongly emphasized that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." Id. at 105.

"Indeed, prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners." Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Medical treatment violates the Eighth Amendment only when it is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986). Mere negligence or medical malpractice is insufficient. See Estelle, 429 U.S. at 106. "Deliberate indifference ... requires obduracy and wantonness, which has been likened to conduct that includes recklessness or a conscious disregard of a serious risk." Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (internal quotes and citations omitted). Disagreement with a doctor's diagnosis, even if that disagreement is by another doctor, does not

establish deliberate indifference. See White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990). Prisoners are not entitled to the best medical care available; they are merely guaranteed that their doctors will not be deliberately indifferent to their needs. See Campbell v. Sacred Heart Hospital, 496 F. Supp. 692, 695 (E.D. Pa. 1980).

1. Against Berks County and the Prison for the policy of denying a seriously ill prisoner access to necessary but costly medical treatment for Hepatitis C.

Plaintiff claims that Berks County and its Prison had a policy to deny him the combination therapy for Hepatitis C. Plaintiff alleges that this purported deprivation resulted from an official policy or custom of Berks County and the Berks County Prison. See Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978).

However, plaintiff has provided no evidence that Bucks County or its Prison had a policy of denying care to Hepatitis C positive inmates. Plaintiff alleged that one other inmate, Eric Miller, was denied treatment. He has produced no evidentiary support for this allegation.

Dr. Jackson, administering the Berks defendants' medical programs, testified that two to three inmates have received treatment for Hepatitis C while at the Prison. She also

testified that Gresh was evaluated for the drug combination therapy, according to standing medical procedures, and ultimately judged to be an inappropriate candidate. After Gresh was released from the Prison, his personal physician confirmed this diagnosis.

Plaintiff has brought no evidence to the court's attention establishing the County or the Prison had a policy of denying medical care to inmates infected with Hepatitis C. He argues that he is the third party beneficiary of a contract between the Prison and Prime Care. However, this allegation was not made in his original Complaint. The claim is not one of those permitted under the order denying in part defendants' motion to dismiss. Discovery did not proceed on this theory, and Gresh did not move to amend his Complaint. Gresh has not identified which part of what contract was purportedly breached. Even if he had, breach of a contract would not necessarily establish liability under Monell: if the Berks defendants had a contract to provide care, and Prime Care breached it, then the Berks County defendants would not necessarily be liable because their policy would have been to provide care, not to fail to do so.

Plaintiff's § 1983 allegations against the Berks County defendants for a policy denying care to inmates infected with

Hepatitis C have no evidentiary support. Summary judgment will be granted as to these claims.<sup>4</sup>

2. Against Carl Hoffman, A. Rab Chowdhury and Marybeth Jackson, in their individual capacities, for denial of appropriate medical care for plaintiff's Hepatitis C

Defendants admit that Hepatitis C constitutes a serious medical need. Gresh contends that their refusal to provide him with drug combination therapy constituted deliberate indifference to that need. Gresh's position is rebutted by the evidence of record.

Dr. Hoffman and Dr. Jackson, Prime Care employees, carefully monitored Gresh's condition during his incarceration. They tested his liver enzymes on a regular basis (6 blood tests in 2000); his liver was biopsied; and he was referred to a liver specialist. This specialist, as well as every other doctor whose evaluation is of record, determined that Gresh was not a suitable candidate for the drug combination therapy. His liver function, while not normal, was not sufficiently impaired to warrant the therapy. He had not been declared psychologically fit, a failure especially relevant in light of his previous attempted suicide.

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<sup>4</sup>It is unnecessary to decide the defendants' contention that Gresh is precluded from re-litigating the issue of their liability.

After Gresh's release from prison, Doctor Riley, who is not a defendant in this action, also concluded that the best treatment course was to "watch and wait," not to administer the treatment.

Gresh's claim reduces to a demand that his belief about his suitability for certain medicines should trump the considered judgment of multiple medical professionals. Defendants' experts state that Gresh's care was within standard medical guidelines: these reports are not controverted. There is no evidence of record from which a reasonable factfinder could conclude that denying Gresh the combination therapy was medically negligent.

Even if it were, that is, if Gresh's belief that he deserved the combination therapy was grounded in fact, he has provided no evidence that defendants believed he was a suitable candidate for the combination therapy and nevertheless denied it to him because of expense or otherwise. Cf. Estelle v. Gamble, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."). Without such evidence, Gresh's claim fails as a matter of law. No reasonable jury could conclude that the defendants' failure to provide Gresh combination therapy was deliberately indifferent to his medical needs; summary judgment will be granted.

3. Against Officer Holliday, in her individual capacity, for denial of medical care when plaintiff was vomiting blood

Plaintiff now admits that "I don't know if there was blood in my vomit." He admits that his stomach pains followed a prolonged, self-imposed fast. Holliday, who is not qualified to administer medical care on her own, secured treatment for Gresh from the first available medical professional. Gresh admits that he does not know if Holliday observed him vomit. Holliday avers that she did see any vomiting, and that she was unaware of Gresh's alleged distress.

The evidence of record establish neither Gresh's serious medical need nor Holliday's deliberate indifference. Summary judgment will be granted for Officer Catherine Holliday.

4. Against Berks County and the Prison for the policy and procedures resulting in prisoners routinely not receiving prescribed medications.

Plaintiff alleged that he was denied medications on numerous occasions. At deposition, plaintiff testified he was unable to distinguish between those days where he was denied medication and those days when it was delivered late.

Occasional missed doses of medication do not implicate the Constitution, see Herndon v. Whitworth, 924 F. Supp. 1171 (N.D. Ga. 1995), although a consistent failure to provide prescribed medication could constitute a "wanton infliction of unnecessary

pain" and violate the Eighth Amendment. Id. at 1173; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

The defendants successfully established there are no material facts of record supporting plaintiff's claim he was denied access to medications when those medications were necessary to treat a serious medical need. The burden then shifted to plaintiff to identify instances of actual denial of access to medication, and the effect on his health. Gresh failed to meet this burden, despite being offered a chance, through counsel, to do so at oral argument. Summary judgment will be granted.

5. Against John Haynes and Sandy Martin, in their individual capacities, for their denials of access to medication

Claims against Haynes and Martin arise from those against the Berks County defendants, and fail for the same reason.

6. Under § 504 of the Rehabilitation Act for denial of access to the dental care program.

Gresh alleged that the Berks County defendants violated the Rehabilitation Act by denying him access to dental care because of his Hepatitis C condition. To prevail under the Rehabilitation Act, Gresh must establish: (1) he was handicapped

within the definition of the Act; (2) he was "otherwise qualified" to participate in the program in question; (3) he was excluded because of his handicap; and (4) the program receives federal funds. August v. PA Dept. of Corrections, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995). Defendants assert the plaintiff fails to meet the third requirement.

Plaintiff admits he was seen by a dentist twice. He also admits that the Prison dentist told him there was no white filling in stock to repair a cavity. The dentist's notes of that conversation state that Gresh was offered the chance to have a silver filling, but that Gresh refused. The defendants have successfully articulated a legitimate reason for denying Gresh dental treatment. The burden therefore shifts to Gresh to establish that disputed issues of material fact defeat summary judgment.

In his deposition, Gresh disputed Dr. Kovaleski's account of their conversation, but did not suggest that the dentist denied him treatment because of his medical condition. Gresh testified that a "Martha Gambler" told him that his condition was the real reason his cavity was not filled. However, he does not provide any evidentiary support for this hearsay account. Absent such evidence, summary judgment will be granted on Gresh's Rehabilitation Act claim.

### III. Conclusion

The defendants' motions for summary judgment will be granted, and judgment will be entered against Gresh and for the defendants on all remaining claims.

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| STEPHEN KARL GRESH | : | CIVIL ACTION |
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|                    | : |              |
| BERKS CO., et. al. | : | No. 00-5697  |

ORDER

AND NOW, this 18th day of July, 2002, for the reasons given in the foregoing memorandum, it is **ORDERED** that:

1. The Motion for Summary Judgment of defendants Chowdhury and Jackson (#56), erroneously docketed as plaintiff's Motion for Summary Judgment (#56), is **GRANTED**. **JUDGMENT IS ENTERED** in favor of defendants A. Rab Chowdhury and Marty Beth Jackson, and against plaintiff Stephen Karl Gresh.
2. The Motion for Summary Judgment of defendants Hoffman, Martin, and Haynes (#58) is **GRANTED**. **JUDGMENT IS ENTERED** in favor of defendants Carl Hoffman, Sandy Martin, and John Haynes and against plaintiff Stephen Karl Gresh.
3. The Motion for Summary Judgment of defendants Berks County, Berks County Prison, and Holliday (#62) is **GRANTED**. **JUDGMENT IS ENTERED** in favor of defendants County of Berks, Berks County Prison Board, and Officer Catherine Holliday and against plaintiff Stephen Karl Gresh.
4. The clerk shall mark this action closed for statistical purposes.

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Norma L. Shapiro, S.J.